not merely an alteration of the remedy but in reality an extinguishment of the several right of creditors under the contract.[13] The same result was produced by the New York Statute involved in *Story* v. *Furman*, for although the theory on which the injunction rested, that the liability constituted a fund for the creditors in general, may have altered the contract right under the conditions named, it seems clear that in denying a several remedy where those conditions did not exist, the statute destroyed a substantive right.

In proceeding on the theory that the change did not lessen the value of the contract or provide a less efficacious remedy the Maryland court failed to give due weight to the real character of the change that was wrought. Where the alteration does not directly affect the contract obligations, the rule prevails that the providing of a remedy as efficacious as the former one or which does not lessen the value of the contract is the test of the law's validity.[14] And, because of the difficulty of determining the relative values of remedies, the courts are frequently compelled to resort to the test of reasonableness.[15] These rules, however, flowing from the necessity of preserving to the States the right to control remedies, must be confined to those cases in which an alteration of the remedy alone is effected. Manifestly, they can have no application where it is clear that the new law operates to abridge an absolute right or change the terms of the contract, since to admit them there would be to permit the State to impose upon the parties a new contract.[16]

DAMAGES RECOVERABLE BY AN ABUTTING OWNER FOR THE OPERATION OF A RAILWAY IN THE STREET.—The question of the extent of the injury sustained because of the use of a highway for railway purposes is controlled primarily by a proper determination of the relative rights of the abutting owner and the general public in the property taken.[1] Since, from the point of view of both the abutting owner and the public these rights are limited by the principle that a highway is devoted solely to highway purposes, any use which is to be considered proper must fall within the definition of this term. Consequently, in order to determine whether legal damage is caused by the appropriation of a street by a railway, it becomes necessary to decide whether or not such a use constitutes the imposition of an additional burden on the highway, and it is generally held that a steam[2] or elevated railroad[3]

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[13]Woodworth *v.* Bowles (1900) 61 Kan. 569.

[14]Louisiana *v.* New Orleans *supra.*

[15]Tennessee *v.* Sneed *supra.*

[16]Planters' Bank *v.* Sharp (1848) 6 How. 301.

[1]Atlanta and West Point R. R. *v.* Atlantic, Birmingham etc. R. R. Co. (1906) 125 Ga. 529; 8 COLUMBIA LAW REVIEW 575.

[2]Imlay *v.* Union Branch R. R. Co. (1857) 26 Conn. 249; Spalding *v.* M. & W. I. Ry. Co. (1907) 225 Ill. 585; Williams *v.* N. Y. C. R. R. Co. (1857) 16 N. Y. 97; but see Fulton *v.* Short Line Ry. Transfer Co. (1887) 85 Ky. 640.

[3]Story *v.* N. Y. El. R. R. Co. (1882) 90 N. Y. 122; Lahr *v.* Met. El. Ry. Co. (1887) 140 N. Y. 268.

is an encroachment, while, except in New York,[4] a street railway is usually considered proper.[5]

Even when it is established that a particular form of railway is an encroachment on the highway, the right of recovery by the abutting owner varies according to whether or not he owns the fee of the street. In the former case, obviously, the direct injury consists in the actual appropriation of the fee, but under the rule that when part of a tract is taken the consequent damage to the residue may also be included,[6] it becomes evident that so long as the property injured is part of the abutting lot, proximity to the street does not control the question of damages. Thus, recovery may be had for all damage resulting to any portion of that parcel from which the appropriated land is taken.[7] Since, however, the actual value of the fee of a street subject to the highway easement is purely nominal,[8] the real damage consists in the injury to the adjoining property, which is conveniently determined by deducting its value just after the construction of the railway from its value just before the taking.[9] In computing this sum, all elements of damage, such as the injury due to noise, smoke and vibration,[10] the interference with access to the premises,[11] the decreased value of the land for the particular use to which it is being put,[12] and the diversion of trade[13] may properly be considered.

Even if the abutting owner does not own the fee of the street, he is permitted to complain of any user which is not within the highway purposes. While some cases sustain this right on the ground that the fee is held by the State or city in trust for street purposes,[14] the more accurate view seems to sustain the implication of a restrictive covenant for the benefit of the abutting owner, that the street shall be used for highway purposes only.[15] In such cases the actual injury consists in the impairment of those *quasi* easements of light, air and access, which are recognized as property rights within the meaning of the constitutional provision prohibiting the taking of private property

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[4]Craig *v.* Rochester City & Brighton R. R. Co. (1868) 39 N. Y. 404; Peck *v.* Schenectady Ry. (1902) 170 N. Y. 298.

[5]Howe *v.* West End Street Ry. Co. (1896) 167 Mass. 46; Canastota Knife Co. *v.* Newing Tramway Co. (1897) 69 Conn. 146.

[6]South Buffalo Ry. Co. *v.* Kirkover (1903) 176 N. Y. 301; 4 COLUMBIA LAW REVIEW 70.

[7]Muller *v.* So. Pac. Branch Ry. Co. (1890) 83 Cal. 240; Taber *v.* N. Y. Prov. & Boston R. R. Co. (1907) 28 R. I. 269.

[8]Muller *v.* So. Pac. Branch Ry. Co. *supra;* 10 COLUMBIA LAW REVIEW 363.

[9]Kucheman & Hinke *v.* The C. C. & D. Ry. Co. (1877) 46 Iowa 366; Henderson *v.* N. Y. C. R. R. Co. (1879) 78 N. Y. 423; Morrow *v.* St. Louis etc. Ry. Co. (1891) 81 Tex. 405.

[10]So. Car. R. R. Co. *v.* Steiner (1871) 44 Ga. 546; Matter of N. Y. C. & H. R. R. R. Co. (N. Y. 1878) 15 Hun. 63.

[11]Matter of N. Y. C. & H. R. R. R. Co. *supra.*

[12]Muller *v.* So. Pac. Branch Ry. Co. *supra.*

[13]Kucheman & Hinke *v.* The C. C. & D. Ry. Co. *supra.* But see So. Car. R. R. Co. *v.* Steiner *supra.*

[14]Story *v.* N. Y. El. Ry. Co. *supra;* Kellinger *v.* Forty-second St. etc. R. R. Co. (1872) 50 N. Y. 206.

[15]See Lahr *v.* Met. El. Ry. Co. *supra.*

for public use without just compensation.[16] Consequently, just as in the case where the abutter owns the fee of the street, it is only those injuries which result proximately from the impairment of recognized property rights that constitute actionable wrongs.[17] Hence, whether they be called direct or consequential, injuries due to smoke, gas, ashes, cinders, obstruction, etc., which affect or impair the easements may be the subject of damages, while injuries due to elements independent of the easements are *damnum absque iniuria* and therefore are not actionable.[18] Inasmuch, however, as these incorporeal rights distinct from the land to which they are appurtenant are of no value in themselves, the amount of recovery is, again, that portion of the diminution of the value of the premises due to the taking of the easements.[19] Some decisions, however, erroneously failing to recognize the true doctrine upon which recovery in such actions is based, fail to distinguish between the cases in which the abutter does and those in which he does not own the fee of the street, and as a result permit recovery for all damages in the latter instance.[20] New York, which applies the correct rule to elevated railroads, fails to allow any recovery at all for damages to easements caused by surface railways.[21] This result can, it seems, be justified only if it should be found as a fact that the street railway does not injure the easements.

The New York Court of Appeals in *Rasch* v. *Nassau Electric R. R. Co.* (N. Y. 1910) 43 N. Y. Law Journal No. 37, an action recently brought by an abutting owner to recover for injuries caused by the operation of trolley cars in front of his premises, accepted the general theory determinative of the question of damages in such cases. Since the plaintiff owned the fee of the street, the court held that the true measure of damages was the market value of the land taken plus the injuries to the residue, and properly allowed a recovery for the depreciation of the adjoining lot caused by noise and vibration.

VOTING TRUSTS AS AN INVASION OF THE RIGHTS OF MINORITY STOCKHOLDERS.—From the fundamental idea that the control and manage-

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[16]Story *v.* N. Y. El. Ry. Co. *supra;* Lahr *v.* Met. El. Ry. Co. *supra;* 2 COLUMBIA LAW REVIEW 158; But see G. R. & I. R. R. Co. *v.* Heisel (1878) 38 Mich. 62.

[17]American Bank Note Co. *v.* N. Y. El. R. R. Co. (1891) 129 N. Y. 252; S. A. R. R. Co. *v.* M. E. R. R. Co. (1893) 138 N. Y. 548; Matter of Brooklyn Union El. R. R. Co. (N. Y. 1906) 113 App. Div. 817, aff'd. in 188 N. Y. 553.

[18]Bohm *v.* Met. El. Ry. Co. (1892) 129 N. Y. 576; S. A. R. R. Co. *v.* M. E. R. R. Co. *supra.*

[19]Drucker *v.* Manhattan Ry. Co. (1887) 106 N. Y. 157; Bohm *v.* Met. El. Ry. Co. *supra;* Newman *v.* M. E. R. R. Co. (1890) 118 N. Y. 618. The above rules, applicable especially to condemnation proceedings, do not however control where the operation of the railroad is carried on in a negligent or unreasonable manner, for in such cases, the railroad having become a nuisance, the ordinary rules governing that class of injuries become applicable, and all damages occasioned thereby may be recovered. Willis *v.* K. & I. Bridge Co. (1898) 104 Ky. 186.

[20]Stehr *v.* Mason City & Ft. D. Ry. Co. (1906) 77 Neb. 641.

[21]Kellinger *v.* Forty-Second St. etc. R. R. Co. *supra;* Fobes *v.* R. W. & O. R. R. Co. (1890) 121 N. Y. 505.